

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

BAIJNATH SAHA (PETITIONER) v. MOHEEP NARAIN SINGH
AND OTHERS (OBJECTORS).^a

1889
March 28.

Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 293—Question for Court executing decree—Defaulting purchaser answering for loss by resale—Description of property at sale and re-sale, Difference of—Regular suit.

An appeal will lie against an order made under s. 293 of the Code of Civil Procedure—*Sree Narain Mitter v. Mahlab Chund* (1), *Sooruj Buksh Singh v. Sree Kishen Doss* (2), *Joobraj Singh v. Gour Buksh* (3), *Bisolkha Moyee Chowdhraim v. Sonatum Doss* (4), *Ram Dial v. Ram Das* (5), followed.

The sale contemplated by s. 293 of that Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293.

Semle :—That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit and not by an application under s. 293.

THIS was an appeal by a decree-holder against an order rejecting an application made by him under s. 293 of the Code of Civil Procedure, for the recovery from a defaulting purchaser, the respondent, of a certain sum of money as deficiency of price on a re-sale of certain properties sold in execution. The circumstances under which that application was made were as follows: Originally eleven properties had been advertised for sale, but as the price bid for five of them was sufficient to satisfy the decree, the remaining six were not put up for sale. The purchaser paid

^a Appeal from Order, No 365 of 1888, against the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 2nd June 1888.

(1) 3 W. R., 3.

(3) 7 W. R., 110.

(2) 6 W. R., Mis., 126.

(4) 16 W. R., 14.

(5) I. L. R., 1 All., 181.

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twenty-five per cent. of the price as required by law, but made default in paying the balance, and a re-sale was thereupon ordered. At the first sale no encumbrance, upon the properties sold, was notified. But before the re-sale, the decree-holder put in a petition asking the Court to notify to intending purchasers two encumbrances upon the said properties, one in favour of a third party under a mortgage bond, and the other in favour of the decree-holder himself under a security bond, by which the said properties were charged as security for arrears of rent of a certain tenure. Both these bonds were of dates long anterior to the date of the first sale, and the encumbrance under the former was fully subsisting at that date. As regards the latter, the amount of the encumbrance notified had not fully accrued due until about a month after the date of the first sale, but in the absence of evidence to show that the rent which constituted the charge was payable only at the end of the year, it may, under s. 53 of the Bengal Tenancy Act, be presumed that it was payable by four instalments, and that three of these had accrued due before the former sale. The two encumbrances were notified at the re-sale, and the price bid for the first five properties was considerably below what they fetched on the former occasion. The other six properties were then sold, and the decree-holder sought to recover from the defaulting purchaser the deficiency in the price of the five properties re-sold diminished by the amount realized by the sale of the other six.

The Nazir who held the sale did not certify the deficiency of price to the Court as required by s. 293. The Subordinate Judge of Shahabad, before whom the application under s. 239 came on for hearing, dismissed the application, holding that there was nothing in s. 293 which directed a Court to enter into these questions summarily, and that they ought to form the subject of enquiry in a regular suit; he also held that it was unnecessary for the Nazir to give the certificate required by law unless 'the properties sold on the last occasion were, according to description, the same as were sold on the first.'

The decree-holder appealed to the High Court, urging that the lower Court had jurisdiction to go into the question of the correctness of the Nazir's report, and that the property being the

same, and the second purchaser not being the appellant, the lower Court should have passed an order in his favour leaving the respondent to contest the matter in a regular suit. On the other hand, the defaulting purchaser, the respondent, contended—*firstly*, that there was no appeal against the order of the Court below; *secondly*, that by reason of the difference in the descriptions of the property at the two sales, the second sale could not be regarded as a re-sale within the meaning of s. 293 of the Code of Civil Procedure; *thirdly*, that the Nazir who held the sale, having refused to certify the deficiency of price, the decree-holder could not recover anything; and, *fourthly*, that the decree-holder, having proceeded against other properties of the judgment-debtor, was not entitled to proceed under s. 293.

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Moulvie Mahomed Yusuf for the appellant.

Mr. C. Gregory for the respondent.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) (after stating the facts) proceeded as follows:—

The first point should, we think, be decided in favour of the appellant. Section 293 of the Code of Civil Procedure enacts, amongst other things, that the deficiency of price happening on a re-sale shall be recoverable by the decree-holder from the defaulting purchaser under the rules contained in Chapter XIX for the execution of a decree for money. Questions like the one disposed of by the Court below in this case, must, therefore, be taken to be of the nature of questions arising between the decree-holder and the judgment-debtor relating to the execution of decrees, such as are contemplated by clause (c) of s. 244.—And as an appeal is allowed from the decision of any of these questions, there is no reason why an appeal should not lie against the decision of the Court below in this case. This view is in accordance with the decisions of this Court in the cases of *Sree Narain Mitter v. Mahtab Chund* (1), *Sooruj Buksh Singh v. Sree Kishen Doss* (2) *Joobraj Singh v. Gour Buksh* (3), *Bisokha Moyee Chowdhraïn v. Sonatun Doss* (4), and with the Full Bench ruling of the Allahabad High Court in the case of

(1) 3 W. R., 3.

(3) 7 W. R., 110.

(2) 6 W. R., Mis., 126.

(4) 15 W. R., 14.

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Ram Dial v. Ram Das (1), with reference to the corresponding provisions of Acts VIII of 1859 and XXIII of 1861. It is true that the point has been considered open to doubt in two later cases,—*Huree Ram v. Hur Pershad Singh* (2) and *Ramdhani Sahai v. Rajram Kooer* (3); but in both these cases the appeal was heard and dismissed upon other grounds: and we see no reason to dissent from the earlier rulings by which an appeal is expressly allowed.

The second contention raised by the respondent is, however, in our opinion, perfectly valid, and this appeal must, therefore, fail. We think the re-sale contemplated by s. 293 of the Code of Civil Procedure must be a sale of the same property that was first sold, and under the same description, and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by s. 287 to enable intending purchasers to judge of the value of the property, should disentitle the decree-holder to recover the deficiency of price under s. 293. No doubt it is quite possible that, between the two sales, the value of the property may be changed by causes such as diluvion and the like, which are beyond the control of anybody; and, in such cases, it might fairly be urged that the decree-holder should not suffer for the purchaser's default. But in the first place that is not the case here. In this case the two encumbrances notified at the re-sale were in existence, either wholly or partially, at the time of the first sale; and one of them must have been known to the decree-holder since it was in his favour; and the other he was bound to enquire into, as the rules made by this Court under s. 287 of the Civil Procedure Code throw upon him the duty of ascertaining and notifying to the Court the encumbrances upon any property advertised for sale in execution of decree. In the second place, even if the difference of description were due to any such cause as is above referred to, although the decree-holder may, under certain circumstances, be entitled to recover damages from the defaulter, that must be by a regular suit and not by an application under s. 293. A claim to recover the deficiency of price

(1) I. L. R., 1 All., 181.

(2) 20 W. R., 397.

(3) I. L. R., 7 Calc., 337.

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by way of compensation would involve inquiry into difficult questions which must be decided before the proper amount of damages could be ascertained; and, the Legislature by leaving it to the officer holding the sale (who is generally a ministerial officer) to certify to the Court the amount that is to be recovered under s. 293, has sufficiently indicated that cases involving questions like these were never intended to be covered by that section, and that the only cases to which that section was intended to apply, are cases where the same property is sold under the same description at both the two sales. In the present case, after the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at the re-sale, it would be allowing him to take advantage of his own neglect of duty. That would be so manifestly inequitable that we are unable to hold that the Legislature could have ever intended such a result.

As the appeal fails upon this ground, it is unnecessary to say anything upon the other two points raised by the respondent.

As regards one of the five properties (it is one of very small value), it was urged that the encumbrances were not notified at the re-sale, just as they had not been notified at the first sale, and that the appellant was consequently entitled to succeed in regard to that property in any case. But the decree-holder's petition, before the re-sale, stated that that was subject to the same encumbrance as the other four, and so, practically, there was no difference between the case of that property and that of the other four.

The result is that this appeal must be dismissed with costs.

T. A. P.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

April 5,
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BUNSEEDHUR (DEFENDANT) v. SUJAAT ALI AND ANOTHER
(PLAINTIFFS).^a

*Decree—Form of decree—Construction of Mortgage bond—Liability
of property other than that Mortgaged.*

Under a mortgage bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor.

Held, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties. *

Narotam Dass v. Sheopargash Singh (1) referred to.

SUIT to recover Rs. 7,346, as principal and interest on an ordinary mortgage bond.

So far as is necessary for the purposes of this report, the facts are as follows:—

The plaintiff sued on a mortgage bond, dated the 6th January 1880, to recover the above-mentioned sum, asking for sale of the properties, the subject of the mortgage, and, if they should be insufficient to meet the amount due, for a decree against the person and other properties of the mortgagor. The mortgage was admitted, the only contention necessary to mention, raised by the defendant, the mortgagor, being, that the plaintiff was not entitled, under the terms of the mortgage, to obtain a decree against the person and other properties of the mortgagor.

The mortgage bond, after reciting that certain sums were due and owing to certain persons, and that the mortgagee had borrowed a certain sum from the mortgagor for the purpose of meeting these liabilities, stated that the mortgagor promised to pay and liquidate the principal amount so borrowed in the month of Jeyt 1291 F. S., and interest amounting to Rs. 45 per month in the month of Assin, year by year; that if such

^a Appeal from Original Decree, No. 59 of 1883, against the decree of Babu Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 12th December 1887.

interest was not paid then, the mortgagee should be at liberty to recover the same by suit; that until repayment of such principal and interest, the mortgagor pledged and mortgaged certain properties; that if ever the mortgaged property should be sold by auction for arrears of Government revenue or any other reason, then the mortgagees, their heirs or representatives might recover the loan, principal and interest, in any manner they might consider feasible, either from the person or other moveable or immoveable property of the mortgagor; and that if the principal was not paid by Jeyt 1291 F. S., then the mortgagee might institute a suit to recover from the mortgaged property.

The Subordinate Judge (after stating that it was contended before him that, inasmuch as the bond did not contain any stipulation for the recovery of the money from the person and mortgaged properties of the mortgagor, except in the case of an auction sale of the mortgaged properties, and provided for its recovery in other cases from the mortgaged property, therefore, the plaintiffs have no right to recover the money from the person or other properties of the mortgagor, save as above mentioned) was of opinion that the plaintiff had a right to recover either from the mortgaged properties, the person of the mortgagor, or his other properties; and that if the parties had intended such a state of things as contended for by the mortgagor, the mortgage bond would have contained a proviso to that effect; but, no such proviso being in existence, he gave the plaintiff a money decree for the principal and interest due, to be paid within six months, and, in default of such payment, for sale of the mortgaged properties, and, on their proving to be insufficient, the plaintiff to be at liberty to recover the balance from the person and other properties of the mortgagor.

The defendant appealed to the High Court on, amongst other grounds, the ground that the plaintiff was not entitled to a decree against the person or other properties of the mortgagor save in the event of the unmortgaged property being sold as in the bond provided for.

Mr. Das, Moulvi Mahomed Yusuf and Babu Durga Mohun Das for the appellant.

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Mr. *Amir Ali* and Moulvi *Serajul Islam* for the respondents.

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Mr. *Das*, on the question of the mortgagor's right to a personal decree, referred to *Narotam Dass v. Sheopargash Singh* (1).

Mr. *Amir Ali* (on this point) contended that it was a vicious principle to attempt to construe one document by another which was not before the Court and which was not even fully set forth in the report. The personal liability of the borrower arose from the transaction independently of the loan which was created by the contract. Unless it distinctly appeared that the mortgagor had abandoned the right to proceed against the person, the Court should not take away that right.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by

TOTTENHAM, J.—This is an appeal against a decree made by the lower Court upon a mortgage bond. The decree is made in favour of the plaintiff for the sum claimed, with costs and interest. The decree provides that should the defendant No. 1 fail to pay up the amount of the decree within six months from the date thereof, the mortgaged properties shall be sold; and if they be insufficient to satisfy the decree, then the plaintiffs shall be at liberty to recover the balance from the person or other property of the defendant No. 1.

The defendant No. 1 has appealed against this decree upon various grounds. There is no dispute as to the execution of the bond, but it is contended, on his behalf, that the Court was wrong in making the debtor or his other property liable for the debt; for it is contended that the mortgage bond itself limits the plaintiffs' means of relief to the mortgaged property, excepting in the event of the mortgaged property having been sold by auction on account of arrears of Government revenue or for any other reason.

The main point in this appeal is, that the lower Court has misconstrued the mortgage bond and has wrongly made the defendant personally liable for the amount as well as other property not covered by the mortgage.

We have given our best attention to the document and the arguments advanced on both sides by learned counsel. The lower Court, while admitting that certain clauses of the deed do support the contention of the defendant, was on the whole of opinion that the intention of the parties was not in accordance with that contention. The Subordinate Judge says: "The bond in suit is an ordinary mortgage bond taken by creditors in this country to secure their money. It contains, as usual, a promise to re-pay and a hypothecation of property in the form of a security. The holder of such a bond has ordinarily the right to recover his money either from the mortgaged property or from the person or other properties of the mortgagor. That right, I think, is not taken away by covenant, which merely provides that the mortgagees will be at liberty to recover their money from the person and other properties of the mortgagor if the mortgaged properties are sold for arrears of revenue, and also to recover it from the mortgaged properties if the mortgagor fails to re-pay the money within the time fixed. These clauses do not lay down that, in the latter case, the mortgagee will not be at liberty to recover any portion of the money from the person and unmortgaged properties of the mortgagor even if the mortgaged properties be insufficient. The bond does not make any provision for such a contingency."

Our attention has also been drawn to s. 90 of the Transfer of Property Act, which provides that, in the event of the sale of the mortgaged property not satisfying the decree given upon the bond, a decree may issue against the person and other property of the debtor. We think, however, that the case brought to our notice, *Narotam Dass v. Sheopargash Singh* (1) being a judgment of the Judicial Committee of the Privy Council, in a case, which, as reported, seems extremely similar to this, compels us to take a view different from that of the lower Court. In that case a Taluqdar in Oudh had executed a deed by which he hypothecated his taluq as security for a debt of Rs. 4,103. The deed also contained a promise that he would re-pay the principal with interest within a term of two years. The Privy Council held that this was a mortgage of the

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estate and nothing else ; that there was no personal contract on the part of the debtor to pay the debt out of his personal estate ; that it was a mere contract to pay out of the hypothecated estate, and as the hypothecation for other reasons was invalid the plaintiff's suit was dismissed. In the present case, the bond contains very much the same provisions as in that case ; but, if anything, its wording is more strongly in favour of the debtor than it was in that case. Here also we have the promise of the debtor to re-pay and liquidate the principal amount in full in one lump sum in Jeyt 1291, together with interest to be paid in a lump in each year. If a similar clause in the bond given by Sheopargash Singh in the case cited did not amount to a contract to pay out of his personal estate, we hardly see how it can be held to amount to such a contract in this case. Here, however, there is something more in favour of the judgment-debtor's contention ; provision is made that if the mortgaged property is sold by auction for arrears of Government revenue, or for any other reason, then it shall be competent to the creditors or their heirs to recover the loan, principal and interest, in any manner that may be considered feasible; either from the person or from the moveable and immoveable property of the debtor ; and the last clause of the bond provides that if, according to agreement, the principal cannot be re-paid in 1291 F, then it shall be competent to the Maharajah to recover, by suit, from the mortgaged property, but it is quite silent as to any further relief.

Therefore upon the clauses of the bond and upon consideration of the decision of the Privy Council in the case mentioned, we are of opinion that we must hold that the defendant is not liable in his person and other property to satisfy the decree on the bond.

The result is that the decree of the lower Court will be modified to this extent, that while we maintain the amount of that decree, the means of satisfying it must be limited to the sale of the mortgaged properties.

Decree varied.

T. A. P.